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SUPREME COURT OF THE UNITED STATES

No. 95-8836

**ELLIS WAYNE FELKER, PETITIONER *v.*
TONY TURPIN, WARDEN**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT AND ON
PETITION FOR A WRIT OF HABEAS CORPUS**

[June 28, 1996]

JUSTICE STEVENS, with whom JUSTICE SOUTER and
JUSTICE BREYER join, concurring.

While I join the Court's opinion, I believe its response to the argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, §2, is incomplete. I therefore add this brief comment.

As the Court correctly concludes, the Act does not divest this Court of jurisdiction to grant petitioner relief by issuing a writ of habeas corpus. It does, however, except the category of orders entered by the courts of appeals pursuant to §106(b)(3) from this Court's statutory jurisdiction to review cases in the courts of appeals pursuant to 28 U. S. C. §1254(1). The Act does not purport to limit our jurisdiction under that section to review interlocutory orders in such cases, to limit our jurisdiction under §1254(2), or to limit our jurisdiction under the All Writs Act, 28 U. S. C. §1651.

Accordingly, there are at least three reasons for rejecting petitioner's argument that the limited exception violates Article III, §2. First, if we retain jurisdiction to review the gatekeeping orders pursuant to the All Writs Act—and petitioner has not suggested otherwise—such orders are not immune from direct review. Second, by entering an appropriate interlocutory order, a court of

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appeals may provide this Court with an opportunity to review its proposed disposition of a motion for leave to file a second or successive habeas application. Third, in the exercise of our habeas corpus jurisdiction, we may consider earlier gatekeeping orders entered by the court of appeals to inform our judgments and provide the parties with the functional equivalent of direct review. In this case the Court correctly denies the writ of habeas corpus because petitioner's claims do not satisfy the requirements of our pre-Act jurisprudence or the requirements of the Act, including the standards governing the court of appeals' gatekeeping function.